UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
Frank Acierno,	)	**Docket No. CWA-03-2005-0376**
Christiana Town Center, LLC and	)	
CTC Phase II, LLC	)	
	)	
Respondents	)	

ORDER GRANTING IN PART AND
DENYING IN PART COMPLAINANT'S MOTION TO STRIKE

I. Introduction

This proceeding under Section 309(g) of the Clean Water Act ("CWA" or "the Act"), 33 U.S.C. § 1309(g), was commenced on September 29, 2005, by a complaint issued by the Director of the Water Protection Division, U.S. Environmental Protection Agency, Region 3 ("Complainant"), charging Respondents, Frank Acierno and Christiana Town Center, LLC ("Christiana"), with violations of Section 301 of the Act (33 U.S.C. § 1311). Specifically, the complaint alleges that Respondents failed to comply with the National Pollutant Discharge Elimination System ("NPDES") General Permit requirements for storm water discharges at the Christiana Town Center ("the Site") located in White Clay Creek Hundred, New Castle County, Delaware, by failing to comply with an applicable Sediment and Stormwater Plan, and thus with the permit, and/or operating without such a plan. For these alleged violations, Complainant seeks a penalty of $157,500.

Respondents, through counsel, filed an answer on October 27, 2005, which denied the alleged violations and requested a hearing. The answer contained twenty-six affirmative defenses including lack of personal and subject matter jurisdiction, failure to name indispensable parties, statute of limitations, laches, unclean hands, estoppel, res judicata, collateral estoppel, unlawful search, double jeopardy, due process violations, equal protection violations, failure to exhaust administrative remedies, imposition of excessive fines, failure to satisfy conditions precedent to the institution of the proceeding, EPA bad faith, and fraud. The answer also included a Motion to Suppress and Dismiss Allegations Arising From Unlawful Search and a Motion to Dismiss Acierno Completely and Christiana Partially. These motions were denied and Complainant's Motion for Leave to Amend Complaint, filed on January 30, 2006, granted by an Order, dated June 30, 2006 ("June Order"). Complainant's Motion for Default Order, which was based on CTC Phase II, LLC's failure to file a timely answer to the Amended Complaint, was denied by an Order, dated December 13, 2006.

On February 8, 2006, Complainant filed a Motion to Strike Certain Portions of Respondents' Answer and Certain Affirmative Defenses and a Memorandum in Support thereof ("Motion to Strike"). The Motion was filed pursuant to Consolidated Rule 22.16 entitled "Motions". Under date of February 23, 2006, Respondents filed a Response in Opposition to Motion to Strike Certain Portions of Respondents' Answer and Certain Affirmative Defenses and a Memorandum in support thereof ("Opposition"). On March 6, 2006, Complainant filed a Reply to Respondents' Response in Opposition to Motion to Strike Certain Portions of Respondents' Answer and Certain Affirmative Defenses ("Reply").

II. Arguments of the Parties

A. Complainant's Argument in Support of Motion to Strike

Noting that the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Consolidated Rules of Practice") do not specifically provide for motions to strike, Complainant argues that 40 C.F.R. § 22.4(c)(10)[1] supplies an adequate basis for the motion and that such a motion would expedite this proceeding (Motion to Strike at 3-4). Specifically, Complainant asserts that Respondents have made unfounded allegations in their Answer that are "offensive and irrelevant" and that allowing the allegations in paragraphs 36, 44,[2] 58,[3] 94,[4] 121,[5] 138[6] and 140[7]

[1] Rule 22.4(c)(10) provides that a Presiding Officer may "[d]o all other acts and take all measures necessary for the maintenance of order and for the efficient, fair and impartial adjudication of issues arising in proceedings governed by these Consolidated Rules of Practice."

[2] In paragraphs 36 and 44 of the Answer [Amended Answer, ¶¶ 42 and 50] Respondents allege that a "corrupt" and "dishonest" New Castle Department of Land Use ("DOLU") employee has been carrying out an illegal plan and scheme to harm Christiana and its owner, in furtherance of his superiors' unlawful and unethical objectives to advance their own personal and political agendas. The Original and Amended Answers allege that the March 2002 and December 2002 Show Cause Decisions resulted from the illegal plan (Amended Answer at 6-7).

[3] Paragraph 58 of the Answer [Amended Answer, ¶ 66] alleges that "on or about May 4, 2004 an illegal search performed pursuant to an unlawfully sought and issued *ex parte* administrative search warrant, procured based upon false and fraudulent allegations, was purportedly executed by the EPA in conjunction with its crooked co-conspirators at the DOLU in furtherance of an ongoing DOLU racketeering scheme aimed at harming the Respondents" (Amended Answer at 11, 12).

[4] Paragraph 94 of the Answer [Amended Answer, ¶ 105] alleges, inter alia, that " EPA declined to entertain any settlement discussions" and that "[t]his was no surprise given EPA's intent to carry out the illegal and potentially criminal course of conduct that it has agreed to undertake against Respondents in concert with the crooked and corrupt DOLU . . . ." (Amended Answer at 17).

[5] Paragraph 121 of the Answer [Amended Answer, ¶ 132] asserts that "[t]he EPA's claims are barred based upon its own fraud" (Amended Answer at 22).

[6] Paragraph 138 of the Answer [Amended Answer, ¶ 139] states, inter alia, that all of the acts alleged by EPA have been manufactured, overstated, or fail to establish any violation of the applicable law (Amended Answer at 23).

of Respondents' answer to stand would interfere with the efficient, fare and impartial adjudication of this enforcement matter (*id.*). Complainant characterizes these allegations" as "beyond good faith pleading", "outrageous" and "baseless" (*id.* at 1, 6). In addition, Complainant argues that the affirmative defenses in paragraphs 100, 101, 102, 103, 111, 114, 116, and 118[8] of the Respondents' answer should be struck because they are unsupported by the law and impede adjudicatory efficiency (*id.* at 4). In accordance with the Addendum to Complainant's Motion to Strike, dated September 5, 2006, the Motion is deemed to be directed at the corresponding paragraphs in the Amended Answer. As noted supra, Complainant recognizes that the Consolidated Rules of Practice do not specifically address motions to strike defenses, but argues that 40 C.F.R. § 22.16[9] authorizes a party to write any motion in a proceeding (*id.*). Further, Complainant cites *Health Care Products, Inc.*, I.F.&R. Docket No. VIII-90-279C, FIFRA Docket No. 93-H-02F, FIFRA Docket No. 95-H-04, 1996 EPA ALJ LEXIS 142 (ALJ June 13, 1996) (motion to strike entertained under Consolidated Rules and Fed. R. Civ. P. 12(f) held to offer appropriate guidance for deciding the motion).[10] Invoking Rule 12(f), Complainant asserts that a court may strike insufficient defenses or eliminate unsupportable defenses that confuse the issues or cause delay (*id.* at 4-5). Moreover,

---

[7] In paragraph 140 of the Answer [Amended Answer, ¶ 141] Respondents describe the Amended Complaint brought by EPA as "the latest installment in its ongoing and seemingly never ending efforts to harass and cause harm" and that it is part of a "nefarious plot" to undertake such illegal activities in conjunction with the corrupt DOLU in violation of the law (Amended Answer at 24).

[8]Amended Answer, ¶¶ 111, 112, 113, 114, 122, 125, 127, and 129. The affirmative defenses are Failure to Name an Indispensable Party: New Castle County; Failure to Name an Indispensable Party: Delaware Department of Natural Resources and Environmental Control ("DNREC"); the Statute of Limitations, Laches, Double Jeopardy Violations, Imposition of Excessive Fines, Failure to Exhaust Administrative Remedies, and Delegation of Authority, respectively.

[9] Consolidated Rule 22.16 provides:

> (a) General. Motions shall be served as provided by § 22.5(b)(2). Upon the filing of a motion, other parties may file responses to the motion and the movant may file a reply to the response. Any additional responsive documents shall be permitted only by order of the Presiding Officer or Environmental Appeals Board, as appropriate. All motions, except those made orally on the record during a hearing, shall:
> (1) Be in writing;
> (2) State the grounds therefor, with particularity;
> (3) Set forth the relief sought; and
> (4) Be accompanied by any affidavit, certificate, other evidence or legal memorandum relied upon.

[10] Rule 12(f) provides that "[u]pon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after service of the pleading upon the party or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." (Fed. R. Civ. P. 12(f)).

Complainant asserts that litigation of insufficient affirmative defenses wastes money and time and detracts from the true issues at hand (*id.* at 5).

Complainant requests that Respondents' affirmative defense that EPA engaged in fraud (Amended Answer, ¶ 132) be struck from the record. In Paragraph 140 of the Answer (Amended Answer, ¶ 141), Respondents refer to three exhibits attached thereto (Motion to Strike at 8). Complainant explains that these exhibits were letters between Respondents' counsel and Complainant (*id.* at 8-9). EPA asserts that "[w]hile each exhibit evidences Respondents' strong disagreement with EPA's legal positions, none of them support the allegations of fraud, harassment, corruption, and conspiracy in the Answer" (*id.* at 9). Contrary to the implication from the quoted language, this does not end the matter, because in their Response to the Motion to Strike Respondents state that "[e]vidence aplenty exists to support Respondents' theory that the County in the operative time period at issue in this action was one of the most corrupt governmental entities in the history of the State of Delaware." [11]

Addressing Respondents' affirmative defense that EPA's claims are barred by the failure to name indispensable parties, i.e., New Castle County and the DOLU (Amended Answer, ¶ 111) and Delaware Department of Natural Resources and Environmental Control ("DNREC") (Amended Answer, ¶ 112) (*id.* at 10), Complainant asserts that there is no precedent for an argument that failure to join an [alleged] indispensable party acts as a defense to an enforcement action under the CWA. Complainant says this is particularly true where neither the State nor the County are liable for the violations alleged at the Site. Complainant points out that the Consolidated Rules of Practice, unlike the Federal Rules of Civil Procedure, do not have a provision that authorizes the dismissal of an enforcement case due to failure to name an indispensable party (*id.*). Moreover, Complainant emphasizes that the Consolidated Rules of

[11] Response at 6. Respondents allege that the County Executive and Chief Administrative Officer are currently under indictment and awaiting trial for alleged violations of the Racketeering Influenced and Corrupt Organizations Act ("RICO") (id.). Additionally, Respondents say that the County's chief protagonist in trumping up charges regarding the Site was none other than the "gopher" for the County's two former government heads, as well as being a former part of the criminally challenged duo's former Police Department brass (id. 6, 7). According to Respondents, it is well documented that the County Executive ordered his minions to do whatever they could to harm any clients represented by Respondents' counsel. Thus, Respondents state that it is quite likely that the County's objective in manufacturing charges about Site conditions was merely to harm Respondents for illicit and reprehensible purposes. Exhibit A to Respondents' Response is a copy of a letter from the United States Attorney for the District of Delaware to U.S. District Judge John P. Fullam, Philadelphia, PA, dated August 8, 2005, Re: **United States v. Thomas P. Gordon, et al., Criminal Action No. 04-63 (JFPP),** which argues for the admissibility of certain recordings to be introduced at the upcoming criminal trial and from which it appears, inter alia, that in 2002 Respondents' counsel, Richard L. Abbott, Esq., was a member of the New Castle County Council and that he and another incumbent were defeated for re-election, Mr. Abbott by nine votes, due in part to efforts of the County Executive and other County officials who directed County employees to work on the campaigns of Abbott's and the other incumbent's opponents. The letter states that the government expects to prove that more than 1,200 County-work hours were expended in support of the campaigns. The letter identifies Mr. Abbott as a practicing lawyer, whose clients included land developers, and quotes, apparently from a recording, the County Executive as expressing an intent to ruin Abbott's legal career by having the County's land use department delay future consideration and approval of matters pending before the department by Abbott's clients.

Practice only authorize administrative tribunals to order relief provided by the statute under which EPA commenced the action.[12] Complainant cites several cases holding that the Consolidated Rules of Practice do not allow the joinder of other persons as respondents.[13] Noting Respondents' concern that DNREC is a necessary party because Respondents might be subjected to multiple enforcement proceedings, Complainant points out that Respondents seek protection under the Part 22 Rules and Fed R. Civ. P. 19 not accorded them by the CWA (Reply at 3). Complainant asserts that the CWA provides only limited protection from subsequent prosecutions to persons who have paid penalties to the State or EPA. Referring to CWA § 309 (g)(6)(ii) (diligent State prosecution) and Section 309 (g)(6)(iii) (payment of a penalty in a federal enforcement action), Complainant says that neither of these provisions would protect Respondents here. This statement is accurate because there is no evidence that the State is diligently prosecuting an action for the violations at issue under comparable State law and no evidence that Respondents have paid a penalty under a final order issued by the Administrator. It should be noted, however, that these "savings provisions" literally preclude penalty action under Subsection (d) of Section 309 (enforcement by action in court), or Section 1321(b) (discharges of oil or hazardous substances), or Section 1365 (citizen suit provision) and makes no mention of Section 309(g) providing for administrative penalties. Additionally, Complainant points out Respondents only speculate that the State might take future enforcement action against them, noting that they have not pointed to any indications that the State intends to do so (Reply at 4). Complainant argues that speculative actions should not be part of a determination of whether a party is necessary under Federal Rule of Civil Procedure 19(a)(1).[14] As to possible enforcement action by the County, Complainant contends Respondents would be protected by the Settlement Agreement and Mutual Release they entered into with the County and the Delaware Department of Transportation in December of 2005 (June Order at 4, note 6) (Reply at 4, note 3).

---

[12] Id. In this instance, to assess civil penalties against the persons found to have violated the Act named in the Complaint as amended. Section 309(g) of the Act (33 U.S.C. § 1319(g)) is entitled "Administrative penalties" and provides in pertinent part "(1) Violations Whenever on the basis of any information available - (A) the Administrator finds that any person has violated [among others] section 1311 . . . of this title, or has violated any permit condition or limitation . . . the Administrator or the Secretary as the case may be, may, after consultation with the State in which the violation occurs, assess a class I civil penalty or a class II civil penalty under this subsection."

[13] Specifically, Complainant cites *Bohl*, Docket No. CWA-3-99-0021, 1999 WL 1678483 (RJO Oct. 12, 1999); *Waterville Industries*, Docket No. RCRA-I-1086, 1988 EPA ALJ LEXIS 8 (ALJ June 23, 1998) (Judge Vanderheyden interpreting an older version of 40 C.F.R. Part 22); *Solon Scott*, Docket No. CWA-IV-404-89-104 (ALJ November 22, 1989).

[14] Id. Federal Rule of Civil Procedure 19(a) states, in pertinent part, that a "person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party."

Moreover, Complainant asserts that even if it were found that the County and/or the State were indispensable to this matter, Fed. R. Civ. P. 19(b) would not require dismissal of this action if they could not be joined (Reply at 5). This is because Fed. R. Civ. P. 19(b) includes four factors for evaluation in determining whether joinder is feasible[15] and Respondents only addressed one, which is the degree of prejudice they may suffer. Complainant maintains that Respondents would not suffer any prejudice as to future State enforcement actions because they would have affirmative defenses such as collateral estoppel, res judicata, and double jeopardy.[16] Further, Complainant argues that it would suffer far greater prejudice if dismissing a case for non-joinder would have the practical effect of interfering with the enforcement scheme intended by Congress.[17] Complainant asserts that the Agency would have to include the State in every EPA civil and administrative action where the State has assumed the NPDES program and has not filed an enforcement action (*id.* at 5-6). According to Complainant, "this would mean that EPA would have to join in any EPA enforcement action any county or municipality with an ordinance controlling erosion and storm water runoff from industrial activity since the discharge might be subject to a subsequent County or municipal enforcement action for violations of the county or municipal code" (*id.* at 6).

Complainant rejects as unsupported by law the affirmative defense (Amended Answer, ¶ 113) that the [Delaware State] statute of limitations bars its claims [or any part thereof].[18] Complainant notes that 28 U.S.C. § 2462 specifies a five- year statute of limitations.[19]

---

[15] Federal Rule Civil Procedure 19(b) provides: **(b) Determination by Court Whenever Joinder not Feasible.** If a person described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent party being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or to those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed.

[16] Reply at 5. This is curious because, as noted infra, Complainant contends that because this is not a criminal proceeding, the "double jeopardy" clause (U.S. Constitution, Amendment V) is not applicable.

[17] Id. According to Complainant, Congress intended to have joinder of parties for CWA actions in limited circumstances (Reply at 6). Complainant points to CWA Section 309(e), 33 U.S.C. § 1319(e), which is the only provision in the CWA requiring joinder of another party and which provides that States be joined as parties when a municipality is a party to a CWA civil action. Complainant notes that the underlying policy for this statute is that otherwise "the State will [be] liable for the payment of judgement or the expenses related to the payment of a judgement to the extent that a municipality is barred from raising revenues for the payment." (*Id.*).

[18] Motion to Strike at 11, 12. Respondents point out that EPA in this action seeks to enforce a Delaware statute, 7.

[19] Del. C. Ch. 40 and Delaware Sediment and Stormwater Regulations ("DSS Regs") and argue that the five-year statute generally applicable to EPA enforcement proceedings, 28 U.S.C.§ 2462, is not applicable (Response at 19). Respondents assert that under Delaware law, "no action based on a statute…shall be brought after the expiration of three (3) years from the accruing of the cause of such

Complainant points out that it filed the complaint on September 27, 2005, and therefore any violations after September 27, 2000 are actionable.[20] (*id.*). Complainant says that Counts I and II of the complaint only seek penalties for violations that occurred after September 27, 2000, and therefore are within the parameters set by 28 U.S.C. § 2462 (*id.*). Complainant acknowledges that no case has directly addressed whether EPA is subject to a State's statute of limitations when EPA approves a State's NPDES program, but also explains that "it is clear that Federal law governs the defenses a permittee may raise in the course of a federal proceeding to enforce the terms of a state-issued NPDES permit," citing, among others, *GMC v. EPA, 168 F. 3d 1377, 1380 (D.C. Cir. 1999)* (Reply at 8). Complainant states that there are cases where courts in dicta find that 28 U.S.C. § 2462 is applicable in EPA [citizen suit] enforcement actions against a State-issued NPDES permit holder, citing *Chesapeake Bay Foundation v. Bethlehem Steel Corp.*, 608 F. Supp. 440 (D. Md. 1985), which reasons, inter alia, that because 28 U.S.C. § 2462 applies to Federal CWA enforcement proceedings, actions under the citizen suit provision should be subject to the same statute of limitations.

Complainant points out that several courts have addressed the issue of which statute of limitations to apply when a private citizen files a suit pursuant to Section 505 of the Act, 33 U.S.C. § 1365. According to Complainant, these cases have found in dicta that 28 U.S.C. § 2462 applies to an EPA [citizen suit] enforcement action against a permittee with a State-issued NPDES permit, citing *Chesapeake Bay Foundation v. Bethlehem Steel Corp.*, 608 F. Supp 440, 446-49 (D. MD 1985) and *Sierra Club v. Simkins Industries, Inc.*, 617 F. Supp. 1120, 1125 (D. MD. 1985) (Reply at 8). Therefore, Complainant urges that this defense be struck.

Complainant argues that Respondents' contention that EPA's claims are barred by laches is legally invalid and should be struck (Motion at 12). Complainant says the defense of laches, like other equitable defenses, is un-mistakenly not available to the Respondents as a defense to liability where the Federal Government is seeking to enforce laws that protect the environment. According to Complainant, it is well settled that equitable defenses cannot "be applied to frustrate the purpose of [federal] laws or to thwart public policy", id., quoting *Pan-American Petroleum and Transp. Co. v. United States*, 273 U.S. 456, 506 (1927), and citing *Kelly v*

---

action…" 10 Del. C. § 8106. (Id.). According to Respondents, the Complaint clearly sets forth allegations with respect to occurrences that took place more than three years prior to the initiation of this proceeding and that, as a result, efforts to seek penalties for such matters are time barred (id.). Complainant says that, even if the Delaware statute applied, only violations occurring prior to September 22, 2002., would be time- barred (Reply at 7).The September 22 date was apparently computed based on the premise that in computing time, the day of filing is not counted and that a year expires one day earlier than the presumed filing date, i.e., one year prior to September 27, 2005, is September 26, 2004, and following. It appears, however, that Complainant applied the five-year statute rather than the three-year statute in making this computation and that claims for violations occurring prior to September 24, 2002, would be time- barred under the Delaware statute. The statute, 28 U.S.C. § 2462, provides that "Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon."

[20] Id. The letter forwarding the Complaint, the Complaint and the Certificate of Service are dated September 29, 2005.

Thomas Solvent Co., 714 F. Supp. 1439, 1451 (W. D. Mich. 1989) (applying the rule to laches); and *United States v. Stringfellow*, 661 F. Supp. 1053. 1062 (C.C. Cal 1987) ("equitable defenses *** cannot be asserted against the government when it acts in its sovereign capacity to protect the public health and safety"). Complainant asserts that the rule has been held to apply when the Federal Government is implementing the Clean Water Act, citing *Deltona Corp. v Alexander,* 682 F. 2d 888, 892 (11th Cir. 1982). Reiterating that this affirmative defense should be struck, Complainant points out that the ALJ in assessing a penalty can still take into account any equitable interests that might be protected by the notion of unreasonable delay in the concept of laches, citing *In re Iowa Turkey Growers Cooperative, d/b/a West Liberty Foods, 2002 EPA ALJ LEXIS 31,*Docket Nos. CWA-07-2001-0052, CERCLA-07-2001-0052. CERCLA -07-2002-009, and EPCRA-07-2002-009 (ALJ May 20, 2002) (id.).

Complainant rejects the affirmative defense (Amended Answer, ¶ 122) that the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution[21] bars EPA's claims in this proceeding (*id.* at 13). Pointing out that the Double Jeopardy Clause prohibits the imposition of multiple criminal punishments for the same offense, Complainant requests that the ALJ strike the defense because the proceeding does not seek any criminal sanctions (*id.*; Reply at 10). Moreover, Complainant states that the constitutional provision would not apply because the United States has not filed any past or currently pending civil action against the Respondents for NPDES violations at the Site (Motion to Strike at 13). While acknowledging that the Corps of Engineers did seek penalties for wetlands violations at the Site, Complainant points out that those penalties were for violations of Section 404 of the CWA, 33 U.S.C. § 1344, which is an entirely separate provision from Section 301, 33 U.S.C. § 1311, involved in this proceeding (*id.*).

Further, Complainant challenges the affirmative defense (Amended Answer, ¶ 125) that the Constitution's Eighth Amendment's prohibition against excessive fines[22] bars the claims against Respondents (*id.* at 14). Specifically, Complainant states that Respondents misunderstand the Clean Water Act's regulatory scheme for assessing penalties. Complainant says Section 309(g)(2)(B), 33 U.S.C. § 1311(g)(2)(B), authorizes the imposition of penalties for violations of, among others, Sections 301 and 402 of the Act, 33 U.S.C. §§ 1311 and 1342, and provides protections against the imposition of excessive fines. Moreover, Complainant notes that Respondents are further protected by the hearing process and the fact that the ALJ could consider whether a [proposed] fine is "excessive" as part of the penalty assessment without barring any claims. Complainant argues that the Eighth Amendment does not bar making claims before the ALJ (*id.* at 14-15).

Complainant contests Respondents' affirmative defense in paragraph 116 of the Answer (Amended Answer, ¶ 127) that the claims are barred by the doctrine of exhaustion of administrative remedies (*id.* at 15). Complainant calls the defense "confusing" and explains that the doctrine requires a non-agency party to exhaust all administrative remedies before seeking judicial review of agency decisions (*id.*). Instead, Complainant asserts that the doctrine of

[21] Amendment V of the U.S. Constitution mandates that "[n]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ."

[22] Amendment VIII of the U.S. Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed . . . ."

exhaustion of administrative remedies requires that a plaintiff first seek review of an agency action within the agency itself. Referring to this proceeding as "the administrative forum of the first resort," Complainant contends that the doctrine does not apply to this proceeding and therefore should be struck from the record (*id.*).

Lastly, Complainant challenges Respondents' affirmative defense in paragraph 118 of the Answer (Amended Answer, ¶ 129) that EPA's delegation of the NPDES Program to the State of Delaware and/or New Castle County bars Complainant's claim (*id.* at 16). Complainant argues that the defense is based on a reasoning that EPA may not file enforcement actions in states where the State NPDES permitting is authorized (*id.*) In addition to a claim that the delegation of CWA authority to a State does not prevent federal enforcement, Complainant emphasizes that the drafters of the CWA included a provision providing that "[n]othing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section 1319 of [Title 33 of the United States Code]" (*id)* (citing 33 U.S.C. § 1342(i)(internal quotations omitted)). Complainant contends that the CWA does not limit EPA's enforcement power and that this proceeding is validly brought under 33 U.S.C. § 1319 of the Act (*id.* at 16-17).

Complainant notes that Section 309 of the Act, 33 U.S.C. § 1319, provides multiple and separately distinct tools of enforcement (Reply at 10-11). Section 309(a) pertains to enforcement by the Administrator of permits and permit programs issued by the States. Section 309(g), the provision authorizing administrative penalty actions, was added to the CWA by the Water Quality Act of 1987, Public Law 100-4 101 Stat 46 . It is probably for this reason that, as Complainant points out, Subsections 309(a) and (g) do not reference each other. Complainant further notes by that the enforcement provision in Subsection 309(a)(1) makes no reference to administrative penalties, but refers to issuing a compliance order pursuant to Subsection 309(a)(3) or filing a civil action pursuant to Subsection 309(b) of the Act, 33 U.S.C. § 1319(b) (*id.* at 11). Further, Complainant points out that Section 309(g)(1) of the CWA, 33 U.S.C. § 1319(g)(1), procedurally requires that EPA consult with the State in which the violation occurs only before assessing a civil penalty under Subsection 309(g).[23]

B. Respondents' Response to the Motion to Strike

Respondents allege that DNREC is the only agency empowered with the authority to enforce Section 402 of the Act, 33 U.S.C. § 1342 and therefore that Complainant cannot bring this proceeding before the ALJ. According to Respondents, New Castle County was delegated the responsibility of implementing the DSS Regs, but DNREC retained enforcement authority (Response at 3). Indeed, Respondents assert that there is no evidence that EPA ever approved of any subdelegation of NPDES responsibilities from DNREC to the County (*id.*). In addition, Respondents argue that Complainant relies "almost exclusively" on New Castle County allegations, but no "mention is made of the fact that DNREC has never alleged that the Site was in violation during the relevant time period". Respondents contend that this constitutes substantial evidence that no NPDES violations occurred at the Site (id. note 1).

[23] Complainant points to paragraph 79 of the Complaint (Amended Complaint, ¶ 90) which states that it consulted with the State of Delaware (Reply at 11). However, Complainant emphasizes that the Act does not require consultation prior to issuance of the complaint, but only prior to penalty assessment (Section 309(g)(1), 33 U.S.C. § 1319(g)(1)).

According to Respondents, it is clear that EPA became involved with the Site based upon tips provided by the County (Response at 7). Therefore, Respondents allege that EPA's endeavors with respect to the Site were taken in furtherance of the County plan and scheme to harm Respondents and their legal counsel (id.). Respondents say that whether EPA was a knowing or unknowing accomplice in the racketeering enterprise conducted by the County is really irrelevant, because the bottom line is that EPA at a minimum became a pawn in an illegal plot concocted by the County (id.). Respondents allege that this fact was brought to EPA's attention on numerous occasions over the past few years, but that EPA has ignored it and proceeded with blind vengeance against Respondents for having the audacity to tell it the truth regarding the impropriety of assisting an unlawful County racketeering enterprise.

Noting Complainant's acknowledgment that the Part 22 Rules do not specifically provide for motions to strike, Respondents argue that this is dispositive of the Motion, because absent authority to strike pleadings, the Motion cannot be granted (Response at 8). Next, they dispute Complainant's contention that the Motion to Strike may be granted on the basis of Rule 22.4(c)(10) (supra note 1). According to Respondents, they complied with the Rule 22.15 requirement that an answer contain legal defenses and disputed facts (id. at 9). They assert that "it would be incongruous to conclude that statements contained in the Respondents' answer which are mandatory pursuant to Rule 22.15 could be stricken based on such an overly general provision as contained in Rule 22.4" (*id.* at 9).

In the alternative, Respondents argue that, even if a motion to strike is authorized under the Consolidated Rules of Practice, Complainant has not adequately reached the threshold which satisfies Rule 12(f). First, Respondents cite federal cases to show that motions to strike affirmative defenses are highly disfavored, and infrequently granted, i.e., *Calloway Golf Co. v Dunlop Slazenger Group Americas, Inc*., 295 F. Supp 2dd 430, 438 (D. Del.2003*); and Martek Biosciences Corp. v. Nutrinova, Inc.*, 2004 WL 2297870, *1 (D. Del., Oct. 8, 2004) (*id.*). Second, Respondents argue that under Rule 12(f), a court is required to view the facts in favor of the non-moving party and deny the motion if the defense is legally sufficient (*id.* at 10). They point out that courts prefer not to grant a motion to strike unless "it is certain that the movant is correct regardless of any statement of the facts that could potentially be proven in support of the defense." (*Id*.). Third, Respondents assert that Rule 12(f) provides that only provisions that are "redundant, immaterial, impertinent, or scandalous" may be struck from the record (*id.*). According to Respondents, the motion to strike should be denied as "long as there is some nexus between the allegation at issue and any claim or defense which has been stated." (*Id.*)

In addition, Respondents argue that paragraphs 36, 44, 58, 94, 121, 138, and 140 in the answer raise valid claims of EPA fraud and allege that " EPA and the County entered into an agreement to unlawfully violate the Respondents 'rights' with respect to the Site by pursuing various matters which preceded this action and by initiating this proceeding." (*Id.* at 6). Respondents assert that "nothing they have stated is improper"and emphasize that Complainant has failed to present any evidence that Respondents' allegations are not factual and relevant (*id.*).

Respondents contend that the seven allegations of EPA misconduct will easily withstand Rule 12(f) scrutiny (*id.* at 11). They refer to a decision by the Delaware Court of Chancery, *Salem Church (DE) Associates v. New Castle County*, 2004 WL 1087341 (Del. Ch. May 6,

2004), where the court denied a motion to strike similar accusations against New Castle County on the basis that the alleged evil motives of government officials formed the basis for one of the claims asserted. The court also found that the allegations of bad faith and misconduct did not reach the level of prejudice necessary to support a motion to strike. Respondents argue that the same reasoning applies to the case at hand (*id.* at 12). According to Respondents, the allegations in the answer of bad faith and misconduct are not at a level sufficient to indicate irrelevance or prejudice (*id.*). Further, Respondents contend that "the fact that the EPA inspector involved in this matter may have personal animus against the Respondents, or has undertaken the efforts which resulted in the proceeding as a result of an illegal scheme concocted with the County goes to the very ability of the EPA to prove its case." (*Id.*). According to Respondents, more than adequate evidence exists to show that EPA was directed in this matter by the County, was assisted in pursuing this matter by the County, and would not ever have initiated this matter but for urging and assistance of the County. Respondents allege that these facts combined with the fact that the County is well established to be a corrupt governmental entity establishes beyond any reasonable question that the matters stated in the Answer are relevant and probative of EPA's case against Respondents (*id*. at 12, 13).

Defending their contention that the EPA has failed to name both DNREC and New Castle County as indispensable parties, Respondents point out that the issue of joinder is directly addressed in 40 C.F.R. § 22.11(a), which provides for intervention on motion by non-parties (Response at 17, 18). However, they apparently recognize that Rule 22.11(a), providing for motions for leave to intervene, does not cover this precise situation, because they assert that the ALJ is at liberty to fashion additional rules beyond the Consolidated Rules where justice and practicality require. They point out that the County is inextricably intertwined with the allegations brought by EPA and contend they will be severely prejudiced in the absence of DNREC and the County [being made parties]. Second, Respondents point out that Federal Rule of Civil Procedure 19(a) provides that additional parties shall be joined in an action if complete relief cannot be accorded to the parties in the absence of the addition of a third party or parties to the proceeding (Motion to Strike at 14). Respondents emphasize that Rule 19(b) (supra note 15) sets out factors to consider whether a party's absence necessitates dismissal of a case (*id.*). As factual support, Respondents argue that DNREC is an indispensable party because it has authority to take enforcement actions and to implement the NPDES program, which could lead to the possibility of multiple obligations (*id.* at 15-16). Respondents also argue that New Castle County must also be joined as a party on the grounds that EPA is acting as its "virtual alter-ego" and that the primary basis of EPA's claims is grounded on County activities, reports, and evidence (*id.* at 17 ("As a result, the County should be joined as a Co-Complainant in the case because the matter has been pursued by the EPA *qua* County, and without the County's presence no fair and just result can be achieved in this proceeding.")).

Respondents also argue that their statute of limitations defense is valid because Delaware's statute should apply instead of the federal one (*id.* at 20). Respondents contend that, since the issue is whether Respondents complied with state law and regulations, state law should apply to procedural and substantive matters (*id.*). In essence, Respondents argue that by transferring NPDES permit authority to DNREC, EPA knowingly and willingly accepted that it would enforce under State laws and regulations, including the State statute of limitations (*id.*). Respondents contend that EPA has waived the benefit of any statute of limitations other than the

one which would apply to an effort by any person to enforce rights accruing to them pursuant to State statute.

As for the defense that EPA's claim is barred by the doctrine of laches, Respondents assert that the defense is legally valid. Instead of explaining why the laches does apply, Respondents focus on why they believe Complainant to be factually mistaken (*id.* at 21). Respondents argue that EPA claims to protect public health and safety but are actually merely attempting to extract a monetary penalty (*id.*). According to Respondents, there is no way that a public health or safety issue "possibly existed" at the Site and, therefore, Complainant seeks only to "wreak vengeance." *(Id.*). In addition, Respondents argue that EPA misstates the holding of one of the cases in Complainant's Motion to Strike, *Deltona Corp. v. Alexander*, 682 F.2d 888 (11th Cir. 1982), because in that case the court held that the federal government was not subject to estoppel. Respondents explain that estoppel is different from laches, and therefore *Deltona Corp.* is not applicable.

In support of its double jeopardy defense, Respondents contend that the purpose of the clause is to prevent successive punishment and successive prosecutions and to protect from multiple punishments (*id.* at 22). Citing *United States v. Halper*, 490 U.S. 435 (1989), Respondents explain that the United States Supreme Court has held that civil sanctions may constitute punishment for double jeopardy purposes when the sanction serves the goal of punishment (*id.* at 22). Respondents state that in this proceeding Complainant does not seek a remedial penalty but is attempting to "mete out punishment." (*Id.* at 23). Moreover, Respondents argue that they have been subject to previous enforcement proceedings, most of which reached settlement in December 2005 (*id.* at 23-24).

Respondents defend their assertions that EPA's claim is barred by the Eighth Amendment. Specifically, they argue that the proposed penalty is punitive and an excessive fine (*id.* at 25). Respondents point out that the Eighth Amendment prohibition on excessive fines applies to civil forfeiture proceedings and therefore should apply to the case at hand (*id.*).

Next, Respondents challenge EPA's claims that "a governmental agency may not be required to exhaust administrative remedies available to it before commencing an adversarial proceeding." (*Id.* at 26-27). Respondents argue that the CWA requires that EPA take certain actions before commencing an administrative adjudication, including following provisions of 33 U.S.C. § 1319(a) (*id.* at 27). According to Respondents, EPA must either notify the violator of the noncompliance and give the State the opportunity to commence enforcement or initiate an action under 33 U.S.C. § 1319(b). Respondents contend that EPA has failed to do one of these two steps and therefore is not entitled to bring forth this action (*id.*). Also, Respondents contend that 33 U.S.C. § 1319(g) requires that Complainant first consult with DNREC before starting the administrative penalty process (*id.*). Respondents allege that the Complaint does not mention EPA's consultation with DNREC and therefore this suit is barred. In addition, Respondents assert that legislative intent shows that State agencies such as DNREC should have the first opportunity to initiate enforcement actions for NPDES permit violations (*id.* at 28).

Lastly, Respondents assert that EPA's delegation of NPDES permitting authority requires the agency to give DNREC the "right of first refusal to pursue enforcement." (*Id.*) Focusing on

33 U.S.C. §§ 1319(a) and (g), Respondents argue that DNREC has an "absolute right" to take action in the place of Complainant (*id.* at 29). According to Respondents, if DNREC were to initiate enforcement then § 1319 would bar EPA's claims. Thus, Respondents argue, Complainant's failure to comply with DNREC right of first refusal or consultation requirements prohibits this proceeding (*id.*).

III. Discussion

Respondent's argument that because the Part 22 Rules of Practice make no express provision for motions to strike, the ALJ is without authority to consider or grant such motions is rejected. It is well settled that, although the Federal Rules of Civil Procedure do not apply to proceedings under Part 22, the FRCP may be relied upon for guidance. See, e.g., *Wego Chemical & Mineral Corporation,* TSCA Appeal No. 92-4, 4 E.A.D. 513 (EAB, 1993) (upholding without discussion of authority to consider the motion, ALJ's denial of motion to strike). See also *Health Care Products, Inc., supra, and Asbestos Specialists, Inc.,* TSCA Appeal No. 92-3, 4 E.A.D. 813 (EAB 1993) (FRCP relied on for guidance). Moreover, there are a plethora of cases where ALJs have granted and denied motions to strike. See, e.g., *Waterville Industries, Inc.* ,supra note 13; and cases cited hereinafter.

Motions to strike will be denied unless the moving party can show that the defense or claim or defense is clearly and apparently legally insufficient (*Environmental Protection Services, Inc.,* Docket No. TSCA-03-2001-0331, 2003 EPA ALJ LEXIS 13, *1 (ALJ February, 28, 2003); *Franklin and Leonhardt Excavating Co., Inc.*, Docket No. CAA-98-011, 1998 EPA ALJ LEXIS 126, *10 (ALJ Dec. 7, 1998)). A motion to strike will be denied if the defense depends on a disputed issue of law or fact (*Environmental Protection Services, Inc.*, 2003 EPA ALJ LEXIS at *1; *Century Aluminum of W. Va., Inc.*, Docket No. CAA-III-116, 1999 EPA ALJ LEXIS 26, *2 (ALJ June 25, 1999)). A court, however, may strike a defense if it is insufficient as a matter of law (*Environmental Protection Services, Inc.*, 2003 EPA ALJ LEXIS at *1; *Century Aluminum of W. Va., Inc.*, Docket No. CAA-III-116, 1999 EPA ALJ LEXIS 26, *2 (ALJ June 25, 1999)).

Generally courts disfavor motions to strike. A motion to strike may be appropriate in narrow circumstances such as redundant or impertinent pleadings and insufficient legal defenses (*General Motors Automotive-North America*, Docket No. RCRA-05-2004-0001, 2005 EPA ALJ LEXIS 31, *5 (ALJ June 8, 2005); *Dearborn Recycling Co.*, Docket No. RCRA-05-2001-0019, 2003 EPA ALJ LEXIS 10, *6 (ALJ January 3, 2003)). However, "motions to strike are generally viewed with disfavor because striking a portion of the pleading is a drastic remedy and because such motions are regarded as a dilatory tactic" (*Dearborn Recycling Co.*, 2003 EPA ALJ LEXIS at *6-7 (internal citations omitted)). As a rule, pleadings are treated liberally and a party has the opportunity to support its assertions at a trial or hearing (*General Motors Automotive-North America*, 2005 EPA ALJ LEXIS at *6). Thus, a motion to strike is not appropriate if there is any possibility that a defense could be made out at trial (*id.*). "Furthermore, even if the arguments raised by Respondent do not constitute complete defenses to liability, they may raise issues that are relevant to the determination of any penalty" (*id.).* (internal citations omitted).

It, of course, goes without saying that if a Motion to Strike is denied as to any defense or claim, and no evidence is proffered or argument raised relating thereto, the defense or claim will be dismissed sub silentio.

A. Paragraphs 36 and 44

Paragraph 36 of the Complaint (Amended Complaint, ¶ 42) alleges that on March 18. 2002, the NCCDLU issued a New Castle County Official Notice of Rule to Show Cause Decision ("March 2002 Show Cause Decision"). Paragraph 43 of the Amended Complaint alleges that the March 2002 Show Cause Decision found that the Site was in "unsatisfactory condition" and that "much of the work [at the Site] deviates from the approved erosion and sediment control plan." Paragraph 44 of the Complaint (Amended Complaint, ¶ 50) alleges that on December 20, 2002, the NCCDLU issued a New Castle County Official Notice of Post-Deprivation Show Cause Decision ("December 2002 Show Cause Decision"). Paragraph 51 of the Amended Complaint alleges that the December 2002 Show Cause Decision revoked the approval of the April 2002 Plan. Respondents' answer to the allegations in these paragraphs is essentially the same, a denial that DOLU issued such a decision (Amended Answer, ¶¶ 42 and 50). Respondents admit, and allege, however, that a corrupt and dishonest DOLU employee who has been carrying out an illegal plan and scheme to harm Christiana and its owner, in furtherance of his superiors' unlawful and unethical objectives to advance their own personal political agendas, issued a Rule To Show Cause Decision in or about March and December 2002.[24]

The Consolidated Rules of Practice provide that an ALJ "shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value . . . ." (40 C.F.R. § 22.22(a)(1)). This is in part, as Complainant has pointed out, to promote judicial efficiency. Moreover, Rule 22.22(a)(1) is intended to prevent abuse by parties inundating the ALJ with irrelevant material to, among other things, delay a proceeding or to detract a fact finder from the issues at hand. However, a motion to strike will be denied if the insufficiency of the defense is not clearly apparent or if it raises factual issues that should be determined at a hearing on the merits (*Waterville Industries, Inc,* supra note 13; *Dearborn Recycling Co.*, 2003 EPA ALJ LEXIS at *8).

As indicated hereinafter (infra note 28), Respondents acknowledge that it is entirely premature at this stage of the proceeding to determine whether Respondents can prove facts necessary to determine the defense of fraud. Moreover, allegations that proceedings against Respondents were orchestrated by a corrupt and dishonest DOLU employee is the real basis for Respondents' contention that the County is an indispensable party. While the County will not be made a party upon the ground, inter alia, that the ALJ lacks the authority to do so, the defense of fraud will not be struck. The consequence of Respondents establishing fraud, would, of course, be dismissal of this action. "If a defense is clearly irrelevant, then it will likely never be raised again by the defendant and can be safely ignored. If a defense may be relevant, then there are

[24] Id. at 6, 7. Particulars concerning the indictment of the County Executive, the Chief Administrative Officer and an Executive Assistant are set forth in *United States of America v. Thomas P. Gordon, Sherry L. Freebery and Janet K. Smith,* 380 F. Supp. 2d 356 (D. Del. 2005)*; United States v. Gordon,* 183 Fed. Appx 202 (3rd Cir.2006), 206 U.S. App. LEXIS 14235, reversing and remanding the District Court's decision insofar as it dismissed portions of the indictment.

other contexts in which the sufficiency of the defense can be more thoroughly tested with the benefit of a fuller record . . . ." (*Van Schouwen v. Connaught Corp.*, 782 F. Supp. 1240, 1245 (N.D. Ill. 1991)). There is precedent for denying a motion to strike when there is a possibility that the defense or defenses may be made out at trial (*Sheffield Steel Corp.*, Docket No. EPCRA-V-96-017, 1997 EPA ALJ LEXIS 100, *8 (ALJ November 21, 1997)).

Respondents have accused County and DOLU employees of conspiracy regarding the development of their land in numerous other administrative and judicial proceedings. *See, e.g., Acierno v. Haggerty*, 2005 U.S. Dist. LEXIS 30353 (D. De. 2005)(setting forth the background of several of these proceeding and dismissing on res judicata (claim preclusion), collateral estoppel (issue preclusion) and abstention grounds an action brought by Acierno against the County, DOLU and named officials. Presumably, these allegations may be developed further at a hearing. Respondents assert that the Magistrate Judge denied the Motion to Quash for the reason that Respondents had failed to exhaust their administrative remedies and argue that issuance of the administrative search warrant was conditioned upon the premise that Respondents would be able to raise issues such as bad faith in obtaining and issuance of the search warrant in administrative proceedings. This argument is sufficiently persuasive that res judicata and collateral estoppel will not preclude the introduction of evidence relevant to these issues. Thus, paragraphs 36 and 44 will not be struck.

B. Paragraphs 58, 94, and 140

Paragraphs 58 and 94 of the Answer (Amended Answer, ¶¶ 66 and 105) accuse Complainant of fraudulently and illegally searching the Site as a part of a conspiracy with the corrupt DOLU. Similarly, paragraph 140 (Amended Answer, 141) alleges that Complainant is perpetuating a "nefarious plot" with DOLU to violate Respondents' rights. As indicated supra, Respondents acknowledge that it is premature at this stage to determine whether they can prove allegations of fraud. They assert, however, that ample evidence will be presented [at the hearing on this matter] that the affidavit presented by the EPA inspector to the U.S. District Court in support of the application for an administrative search warrant contained false statements (Opposition at 13, note 2). An example of a false representation is the assertion that there were ongoing earth moving activities at the Site, despite the alleged fact that nothing in that respect had taken place for the preceding six months. This matter should be heard on the merits on the basis that these assertions may be relevant in the context of the record. Thus, paragraphs 58, 94, and 140 of the Answer will not be struck.

C. Paragraph 121

Respondents allege in paragraph 121 of the Answer (Amended Answer, ¶ 132) that EPA's claims are barred based on its own fraud. As indicated supra, Respondents acknowledge that it is entirely premature at this stage of the proceeding to determine whether Respondents can prove facts necessary to establish the defense of fraud. They assert, however, that ample evidence will be presented [at the hearing in this matter] of false statements made by the named EPA inspector to the U. S. District Court in order to hoodwink the Court into issuing the "secretive ex parte administrative search warrant". (Id.). Moreover, Respondents' assertions in

paragraphs 58 and 94 are directly related to the allegation in paragraph 121. Thus, paragraph 121 will not be struck.

D. Paragraphs 138

Complaint seeks to strike paragraph 138 of the Answer where Respondents assert that the charges "have been manufactured, overstated, or fail to establish any violation of the applicable law." According to Respondents, evidence exits establishing with great weight that the entire Site has at all times had a valid, approved E & S Plan, and that it has consistently kept in conformance with the law . . . ." (*Id*.). Again, Complainant maintains that this paragraph should be struck because it is baseless. However, Respondents do not appear to be asserting any matter other than they disputing Complainant's factual claims. This type of assertion is in line with the functional purpose of an answer, which is to act as a vehicle for framing factual issues in dispute. Therefore, paragraph 138 of the Answer will not be struck.

E. Paragraphs 100 and 101

Respondents argue that this proceeding should be dismissed because DOLU and DNREC are not included as parties. Complainant has correctly pointed out that the Consolidated Rules of Practice to not contain any provisions addressing dismissal of enforcement cases in the absence of an [alleged] indispensable party. Moreover, the authority to issue, amend, or withdraw Class II administrative complaints under the CWA has been delegated to Regional Administrators and the Assistant Administrator for Enforcement and Compliance Assurance with authority to redelegate to the Division Director level.[25] Administrative Law Judges are not included in this delegation or re- delegation and simply have no authority to issue complaints or im-plead third parties under the Clean Water Act.

When the Consolidated Rules of Practice are silent, the Federal Rules of Civil Procedure may provide guidance even though the FRCP are not binding in administrative matters (*S & S Landfill, Inc.*, Docket No. CAA-III-002, 1994 EPA ALJ LEXIS 65, *7 (ALJ Sept. 22, 1994); *Rogers Corp.*, Docket No. TSCA-I-94-1079, 1997 EPA ALJ LEXIS 20 *2, n.2 (ALJ June 19, 1997)). The Federal Rules of Civil Procedure allow for dismissal on the grounds of failure to join an indispensable party (Fed. R. Civ. P. 12(b)(7); Fed. R. Civ. P. 19). If a federal court decides under the criteria in Rule 19(a) that a party is necessary for adjudication, it then may proceed to Rule 19(b) factors to determine whether dismissal is appropriate.

Even under the Federal Rules of Civil Procedure, Respondents' arguments are insufficient. According to Rule 19(a), a party is "necessary" if its absence would prevent an award of complete relief or if the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest." As proof of why DOLU and DNREC are "necessary", Respondents argue that further litigation may occur on the State level. As

[25] See OHR Intranet -Delegations Manual, Clean Water Act 2-52-A Class II Administrative Penalty, 1200 TN 350 5/11/94.

Complainant has pointed out, however (supra at 5), the CWA affords Respondents only limited protection from multiple enforcement proceedings by EPA and the State and those limited circumstances are not applicable here. While it may well be that witnesses and other evidence from the County will be required in order to develop the facts in this matter, it must be presumed at this stage of the proceeding that the County and its employees will be responsive to subpoena issued under Section 309(g)(10). No allegations of misconduct or malfeasance have been made against the DNREC and Respondents' contention that the DNREC is an indispensable party, being based upon the fact that DNREC retains enforcement authority, is simply not persuasive.

The possibility of another action in a different forum does not establish that either DOLU or DNREC is a "necessary" party. Moreover, although Respondents suggest that additional litigation actions could take place, they have failed to establish the likelihood that a state action may occur. "The focus of Rule 19(a) is on the relief between the parties and not on the speculative possibility of further litigation between a party and an absent person." (*Central States, Southeast and Southwest Area Pension Fund v. Safeco Ins. Co. of America*, 717 F. Supp. 572, 574 (N.D. Ill. 1989). Respondents have not provided any persuasive reason as to why DOLU or DNREC's absence would prevent the ALJ from awarding complete relief, which as noted supra, is limited to the assessment of a penalty against named persons for violations of the Act. In light of the fact that Respondents have failed to show why DOLU and DNREC are indispensable parties, Complainant's request to strike paragraphs 100 and 101 will be granted.

F. Paragraph 102

Respondents have not provided a sufficient basis for the affirmative defense in paragraph 102 of the answer, which asserts that Complainant's claims are barred by the statute of limitations. Respondents correctly point out that the federal statute of limitations provides that a proceeding may be initiated within five years from the date a claim accrues (28 U.S.C. § 2462), while the Delaware law provides for a three year deadline (10 Del. C. § 8106).

The Clean Water Act does not provide a relevant statute of limitations (*Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals Inc.*, 913 F.2d 64, 74 (3d Cir. 1990)). In circumstances where there is no specified time limit, courts "borrow" the most suitable statute available (*DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 158 (1983)). A federal court will apply a state statute of limitations if there is no relevant federal statute (*Sierra Club v. Chevron U.S.A., Inc.*, 834 F.2d 1517, 1521 (9th Cir. 1987)). Moreover, a statute of limitations will not be applied if doing so would frustrate federal policy (*Occidental Life Insurance v. EEOC*, 432 U.S. 355, 367 (1977)).

In the present case, 28 U.S.C. § 2462 applies because it is relevant.[26] The statute provides that unless otherwise provided by an Act of Congress an action or proceeding for the enforcement of any fine or penalty shall not be entertained unless commenced within five years from the date when the claim first accrued. Moreover, the CWA authorizes the EPA

[26] The federal statute of limitations has been applied to other provisions of the CWA. As Complainant has correctly pointed out, several courts have applied the federal statute of limitations in CWA citizen enforcement suits.

Administrator to enforce a permit, regardless of whether the permit is issued by EPA or by a State agency (33 U.S.C. § 1319). Even where a state issues and enforces permits, the EPA Administrator retains the power to independently pursue an enforcement action (*id.*). An action or proceeding by the Administrator to enforce a State issued permit is a federal proceeding governed by federal law. *See General Motors v EPA,* supra. Thus, Respondents' affirmative defense in paragraph 102 of the answer shall be struck from the record.

G. Paragraph 103

In paragraph 103 of the Answer (Amended Answer, ¶ 141) Respondents have argued that EPA's claims are barred based on the equitable defense of laches. Under the doctrine of laches, a court denies relief when a claimant has engaged in such unreasonable delay or negligence in asserting a claim that it results in prejudice to the opposing party. It is well settled that the doctrine of laches does not bar the enforcement of statutes intended to protect public health and the environment. In addition to the cases cited by Complainant, supra at 8, *see United States v Amoco Oil Company*, 580 F. Supp 1042 (W.D. Mo. 1984) (it is clear that the defense of laches does not apply to the United States when it acts in its sovereign capacity; "generally speaking public officers have no authority to waive enforcement of the law on behalf of the public"). While Respondents contend that this proceeding involves the assessment of punitive penalties rather than the protection of public health and the environment, this argument overlooks the enforcement scheme provided by Congress which provides for the assessment of penalties as a deterrent to future violations. There is no indication that Complainant has delayed in any inordinate way which would create harm to Respondents' interest. The alleged violations started in 2002 and the Complaint was filed in September of 2005. This suggests that there has not been an unreasonable delay in enforcement. Therefore, a claim of laches is unsupportable and will be struck from the record.

H. Paragraph 111

Paragraph 111 of the answer is also legally unsupported and should be struck from the record. It is well settled that the Double Jeopardy Clause only applies to multiple criminal[27] punishments for the same offense (*Hudson v. United States*, 522 U.S. 93, 99 (1997)). Respondents' reliance on *Halper* is misguided and unpersuasive (*id.* at 101 "We believe that *Halper*'s deviation from longstanding double jeopardy principles was ill considered."). Because this proceeding seeks civil penalties, the principles of double jeopardy are irrelevant. Although a motion to strike is generally disfavored, this affirmative defense lacks merit and will be struck from the record.

[27] "Whether a particular punishment is criminal or civil is, at least initially, a matter of statutory construction." (*id*). Numerous factors are considered in order to determine whether a penalty is civil or criminal, including whether the statutory scheme is punitive in purpose or effect (*id.).* However, the Supreme Court made a distinction between civil penalties with a deterrent effect and a criminal penalty (*id.* at 102).

I. Paragraph 114

In paragraph 114 of the Answer (Amended Answer,¶ 125) Respondents have argued that EPA's claims are barred because of the Eighth Amendment's prohibition against excessive fines. When Congress drafted Section 309(g) of the CWA, it provided the Agency with the power to assess civil penalties administratively and also provided Respondents procedural protections. Section 309(g)(2)(B), 33 U.S.C. § 1319(g)(2)(B), addresses Class II administrative civil penalties, the kind at issue here. That section specifies a $10,000 limit for each day the violation continues with a maximum of $125,000.[28] and provides a respondent with the right to a hearing (33 U.S.C. § 1319(g)(2)). Moreover, Section 309(g)(3), 33 U.S.C. § 1319(g)(3),[29] requires that penalties take into account, inter alia, the circumstances and seriousness of the violation Thus, there are established procedures to ensure that a civil fine is not "excessive." The administrative penalty process protects against Eighth Amendment violations and therefore Respondents' defense is legally invalid. Paragraph 114 of the answer shall be struck from the record.

J. Paragraph 116

Respondents' defense that EPA has failed to exhaust administrative remedies is also legally invalid. The doctrine of administrative exhaustion requires that a claimant must seek relief from an administrative body before seeking relief from a federal court. Judicial relief is not available until the administrative process has ended (*McKart v. United States*, 395 U.S. 185, 193-195 (1969)). The purpose is to ensure that the federal court system will not be burdened by cases in which an administrative body may provide relief. Moreover, the Supreme Court has stated that the doctrine of administrative exhaustion is appropriate as a matter of deference to agency expertise and to prevent interruptions in the administrative process (*id.* at 194). For example, the doctrine requires that a party first appeal an agency action within an agency. As this proceeding is the beginning of an administrative action, this doctrine clearly does not apply.

However, Respondents' contentions in the Response indicates that they are actually arguing failure to satisfy a condition precedent (Amended Answer, ¶ 131) rather than the doctrine of administrative exhaustion. Instead, Respondents argue that Complainant violated 33 U.S.C. § 1319(a) and (b) because it failed to either directly notify Respondents of any violations or give the State an option of enforcement (Response at 27). Complainant disputes this assertion pointing to paragraph 79 of the Complaint (Amended Complainant, ¶ 90) which state that Complainant consulted with the State of Delaware regarding this action (supra note 23). Respondents go on to assert that enforcement power was delegated to the Delaware DNREC and "EPA rushed headlong in filing this proceeding, no doubt as a result of its bloodlust to cause great harm and punishment . . . ." (*id.* at 28). EPA approved Delaware's program for the control

[28] These sums have been increased by the Adjustment of Civil Monetary Penalties for Inflation Rule to a maximum of $11,000 per day and to a maximum penalty amount of $157,500 (40 C.F.R. Part 19).

[29] Section 309(g)(3), 33 U.S.C. § 1319(g)(3), states in part that "[i]n determining the amount of any penalty . . . the Administrator . . . shall take into account the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require."

of discharges to navigable waters in accordance with the NPDES on April 1, 1974 (39 Fed. Reg. 26061, 39 Fed. Reg 31695 (1974)). On October 23, 1992, the State received approval to administer its General Permits Program. The Memorandum of Agreement ("MOA") between EPA and the State of Delaware, dated October 26, 1982 (approved by the Administrator on May 4, 1983), provides with respect to action against violators, inter alia, that if EPA determines that the State's action or inaction [against a violator] is not appropriate, EPA may proceed against the violator with all of the enforcement options available under Section 309 of the CWA. Additionally, the MOA provides that nothing therein shall be construed to limit the authority of EPA to take action pursuant to Sections 308, 309, 311, 402, 504 or other sections of the CWA. Thus, paragraph 116 of the Answer (Amended Answer, ¶ 131) will be struck.

K. Paragraph 118

Respondents argument that the Agency cannot enforce the CWA because it has already delegated that power to Delaware has been answered in the discussion concerning paragraph 116 and is unavailing for the same reason. Thus, paragraph 118 of the Answer will be struck.

ORDER

1. Complainant's Motion to Strike paragraph 36 of the Answer, paragraph 44, paragraph 58, paragraph 94, paragraph 140, paragraph 121, and paragraph 138 of the Answer is denied.
2. Complainant's Motion to strike paragraph 100 of the Answer, paragraph 101, paragraph 102, paragraph 103, paragraph 111, paragraph 114, paragraph 116, and paragraph 118 of the Answer is granted.

Dated this __28th_____day of February, 2007.

_____
Spencer T. Nissen
Administrative Law Judge